



REPUBLIC OF KENYA
 COURT OF APPEAL AT KISUMU
 CRIMINAL APPEAL 391 OF 2010

BETWEEN

J.O.N APPELLANT

AND

REPUBLIC RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J.) dated 17th August, 2010

in

H.C.CR.A NO. 52 OF 2003)

JUDGMENT OF THE COURT

Mwera, J. sitting with the aid of assessors, tried the Appellant **J.O.N.**, on an information that had charged him with murder contrary to **section 202** as read with **section 204** of the Penal Code. The particulars of the offence were that on the 12th day of *January, 2003* at Jimo West Sub-Location of the then Nyando District of the then Nyanza Province, the Appellant murdered **M.A.O**, hereinafter **“the deceased”**.

After hearing the evidence of the prosecution and the sworn testimony of the Appellant, the learned Judge summed-up the case for the three assessors as the law then required him to do. The assessors were unanimous that the Appellant was guilty of the charge of murder. The Judge, however, in the end found the Appellant guilty of the offence of manslaughter. Mwera, J.’s judgment was delivered on his behalf by Aroni, J. who then proceeded to sentence the Appellant to twenty (20) years imprisonment. Aroni, J. must have applied the provisions of **section 201(2)** of the Criminal Procedure Code. That section applies the provisions of **Section 200** of the Code which deal with trials in the subordinate courts and which provide for the continuation of trials before a succeeding magistrate where another magistrate previously hearing the case has been transferred or is for one reason or the other, unable to continue with the trial. **Section 201(2)** of the Code applies those provisions, *mutatis mutandis*, to trials in the High Court.

At the time of her death, the deceased was a girl either of 13 or 14 years. On the date of her death, she and **E.A.O** (P.W.1.) had gone to fetch firewood near the home of the Appellant. E was then fourteen years old and she gave evidence on oath. Her evidence was that when the Appellant saw the two of them collecting firewood from the fence surrounding the home of the Appellant’s parents, he took offence at this and told the two girls that he would kill them. The girls took flight with E out running the deceased. The Appellant caught up with the deceased, got hold of her neck and apparently strangled her. The time was about 5 p.m. and while running away, E looked back and saw the Appellant holding the

deceased by her neck. E ran straight to the home of **B.A.O.** (P.W.2.) which was nearby and having been told by E what had happened, the two of them immediately ran back to the scene. They found the deceased lying down dead. E said she did not see the Appellant at the scene but B. said she saw him walking away and followed him. On the way, the appellant met **M.O.A** (P.W.3.), apparently the husband of B. and according to B. and M., the Appellant asked M. if the deceased was epileptic. M. denied knowing anything of that kind and B. told the two men that they all return to the scene and hear what E had to say on the matter. The Appellant attempted to go away but M. got hold of him and they went back to the scene where the deceased was lying dead. The Appellant was arrested and was subsequently charged with the murder of the deceased. The post-mortem report produced by **Dr. Charles Kibicho Muturi** (P.W.6.) on behalf of **Dr. Margaret Oduor** showed that the deceased had died due to asphyxia due to strangulation. In his sworn evidence, the Appellant appears to have been contending that the deceased must have been epileptic and had a seizure and as she was carrying a heavy bundle of fire-wood, that might have caused her death. There were other allegations about the grudge between him (Appellant) and M. who was at the time an [particulars withheld] and the Appellant was saying that M. himself was arrested over the same issue but was able to bribe his way out of the problem.

The assessors and the learned Judge had no difficulty in believing E and the other prosecution witnesses and rejecting the evidence of the Appellant. We think they were right in doing so. E was a young girl and nothing is apparent from the record why she would make up the story about the Appellant chasing her and the deceased. Mr. Musomba, learned counsel for the Appellant, in urging the appeal before us told us that the Appellant was a psychopath because he was in the habit of scaring people and Mr. Musomba cited to us Black's Law Dictionary, 8th Ed. where a "**psychopath**" is defined as:-

"A person with a mental disorder characterized by an extremely antisocial personality that often leads to aggressive, perverted or criminal behavior."

Mr. Musomba, basing himself on that definition, asked us either to acquit the Appellant or to find him guilty but insane. There is and there was absolutely no evidence on record which would justify any such conclusion. The Appellant himself gave evidence on oath and at no stage of that evidence did he allude to any defect in his mental health. To the contrary, it was him who was casting aspersion on the health of the deceased by claiming that the deceased was epileptic. None of the witnesses who testified on behalf of the prosecution ever alluded to any mental abnormality on the part of the Appellant. Counsel for the Appellant was merely setting-up his own theory regarding the mental health of the Appellant while the Appellant himself made no such claim. We are satisfied on the recorded evidence that the Appellant attacked E. and the deceased because the two went to fetch firewood from the fence surrounding their home, that he threatened the young girls with death, chased the deceased, caught up with her and strangled her to death. In our view, the Appellant was lucky that the learned Judge convicted him of the lesser offence of manslaughter. The girl he strangled to death was a total orphan who was being cared for by her relatives. We think the sentence of twenty years imprisonment was, in all the circumstances of the case, justified and we see no reason why we should interfere. The Appellant's appeal wholly fails and we order that it be and is hereby dismissed.

Dated and delivered at KISUMU this 22nd day of March, 2012.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR